STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

BEVERLY HEIKKILA, as Personal Representative of the ESTATE OF SHERI L. WILLIAMS,

Plaintiff-Appellant,

v

NORTH STAR TRUCKING, INC.,

Defendant,

and

MARC ROLLAND SEVIGNY and J. R. PHILLIPS TRUCKING, LTD.,

Defendants-Appellees,

and

NORTH STAR STEEL CO.,

Defendant/Cross-Plaintiff-Appellee,

v

INTERNATIONAL MILL SERVICE, INC.,

Defendant/Cross-Defendant-Appellant,

Cross-Defendant.

UNPUBLISHED
December 7, 2004

No. 246761
Monroe Circuit Court
LC No. 00-011135-NI

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NOTICE OF HEARING

DEFENDANT-APPELLANT INTERNATIONAL MILL SERVICE, INC.'S

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

PLUNKETT & COONEY, P.C.

By: ROBERT G. KAMENEC (P35283)
Attorney for Defendant-Appellant
International Mill Service, Inc.
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

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STATEMENT CONCERNING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF

Defendant-Appellant International Mill Services, Inc. ("International") seeks appellate review and reversal of the December 7, 2004 Opinion of the Michigan Court of Appeals (attached next and also found as **Exhibit S**) which reversed the grant of summary disposition in favor of Defendants because Plaintiff failed to establish the identity of the instrument which she claims caused the death, and further failed to demonstrate a plausible, non-speculative theory of causation. In a badly fractured opinion, two Judges of the Michigan Court of Appeals (Smolenski, P.J. and White, J.) determined that Plaintiff satisfied her burden of showing that the object which struck the decedent was a piece of slag from the facility of North Star Steel, and further provided sufficient evidence that the slag was wedged between the trailer tires of a truck driven by Marc Rolland Sevigny and owned by J.R. Phillips Trucking, Ltd. (Slip Op, pp 3-4). Judge Kelly dissented from this determination upon reasoning that Plaintiff failed to demonstrate that the object that caused the decedent's death was slag, and further failed to demonstrate that the object which caused the decedent's injury came from North Star and International's operations (Slip Op, Kelly concurring in part and dissenting in part, p 3). The Court of Appeals majority also declined to address the issue of the Defendants' duty to the decedent.

Defendant International requests this Court peremptorily reverse the Court of Appeals' decision and reinstate the grant of summary disposition in its favor. In the alternative, Defendant International requests this Court grant leave to appeal on the substantive issues presented, namely whether Plaintiff presented sufficient proofs on the identity of the object, its alleged origin with International, and generally with Plaintiff's theory of causation, to remove such questions from the realm of conjecture and speculation and allow for jury consideration and the existence of any duty. International also requests recovery of all costs and attorney fees sustained on appeal.

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COURT OF APPEALS

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UNPUBLISHED
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No. 246761
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Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants. Plaintiff also appeals from the trial court's ruling excluding the testimony of three expert witnesses. We reverse the trial court's ruling with respect to the grant of summary disposition, but affirm the trial court's evidentiary ruling.

This case involved a fatal accident in which plaintiff's decedent, Sheri Williams, was struck in the head by an object as she drove her car. Plaintiff's theory is that a piece of slag[1] had been lodged in the tires of a truck driven by defendant Marc Rolland Sevingy ("Sevigny"), and owned by defendant J. R. Phillips Trucking Ltd. ("Phillips"). This truck was hauling slag from a steel mill owned by defendant North Star Steel Company ("North Star"). Although the facility was owned by North Star, defendant International Mill Service, Inc., ("IMS"), contracted with North Star to handle the slag-hauling portion of the job. Plaintiff claimed negligence against all defendants.[2]

In granting summary disposition, the trial court ruled that plaintiff could not establish that defendants' actions served as the proximate cause of the decedent's injuries. In *Lysogorski v Charter Twp of Bridgeport,* 256 Mich App 297, 298-299; 662 NW2d 108 (2003), this Court restated the standard of review applicable to a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10):

> We review the grant or denial of a motion for summary disposition de novo. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, and the court considers the affidavits, pleadings, depositions, admissions, and other evidence in a light most favorable to the non-moving party. The entire lower-court record must be reviewed, and if the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [Citations omitted.]

"To establish a prima facie case of negligence, a plaintiff must be able to prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Haliw v City of Sterling Hts,* 464 Mich 297, 309-310; 627 NW2d 581 (2001). "Proof of causation requires both cause in fact and legal, or proximate, cause." *Id.* at 310, citing *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994).

In *Skinner, supra* at 164-165, our Supreme Court addressed the requisite degree of proof a plaintiff must satisfy to survive summary disposition on the issue of proximate cause:

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co,* 347 Mich 417, 422; 79 NW2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:
>
> > "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not

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[1] "Slag" is defined as "the more or less completely fused and vitrified matter separated during the reduction of a metal from its ore." *Random House Webster's College Dictionary* (1997), p 1212.

[2] North Star's indemnity claim against IMS is not at issue here.

> deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."
>
> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Here, there is no question that Williams' injuries were caused when something struck her windshield, dash board and steering wheel, and then her head, continuing through the car until it exited through the rear window. Spencer Maniaci, who was driving behind Williams, witnessed this, and indicated that the object was less than a foot in size, and irregularly shaped. Maniaci believed the object that struck Williams bounced off her trunk and came to a stop near the curb.

R. Matthew Brach, one of defendants' experts, explained that, based on the force and trajectory of the object which struck Williams, it was doubtful that the object merely fell off a truck. Responding to plaintiff's counsel's rhetorical question as to whether the object "fell from the sky," Brach also explained that such a conclusion was also not possible. In fact, Brach stated that the only possibility he was aware of was that the object was thrown from the tires of Sevigny's truck.

Considering evidence that the object that struck Williams did so as her car passed Sevigny's truck, Maniaci's testimony that he saw the object fly by Williams' car, and Brach's interpretation of the trajectory that an object went through Williams' car, from the windshield through the rear window, we find that plaintiff has set forth sufficient evidence to suggest that, more likely than not, the object probably was thrown from the truck, as opposed to falling off the truck, or falling from the sky, or coming from anywhere else. *Skinner, supra,* cautions against allowing a jury to base its decision on conjecture, which is merely guessing between two plausible explanations where there is nothing to suggest that either explanation has more force. In this case, based on this evidence, the only legitimate explanation appears to be that the object was hurled by Sevigny's tires towards Williams' car. Even if there were other explanations, the trajectory and velocity of the object, as well as the timing of the accident, make it more probable than not that the object was thrown from Sevigny's tires.

Moreover, we find that plaintiff has satisfied her burden of showing that the object was more likely than not a piece of slag from North Star's facility. Corporal Brett C. Ansel, of the Michigan State Police, investigated the accident scene. Ansel identified what he believed was

the object that struck Williams; the object was large and it was in the roadway. However, it was later determined that the object was composed of concrete, and not slag. Despite this, Ansel continued to believe that Williams was struck by slag. Ansel testified that he felt Williams' steering wheel, and felt a gritty substance that was similar in feel to the grit he felt when he handled a piece of slag.

Plaintiff's expert, Scott Stoeffler, provided an affidavit in which he explained that he inspected Williams' car and took samples for analysis. Based on his inspection of the material he took from Williams' car, Stoeffler opined "that more likely than not, the object that went through Ms. Williams' vehicle was composed primarily of carbon or alloy steel and was not a rock, stone or piece of concrete." This opinion bolsters plaintiff's theory that the object was slag, and not the concrete found at the scene.

Moreover, gouge marks found on the pavement suggest that the object was lodged in the truck's tires at the time the truck left North Star's facility. Lieutenant Danny Richards of the Michigan State Police was deposed about the gouge marks he found at the crash scene. Richards and Ansel found gouge marks that were "about ten feet, eight inches apart." These gouge marks ran parallel to the centerline of the roadway, in the inside lane, and followed the path of Sevigny's truck. Richards testified that the gouge marks were traceable back to North Star's facility. Ansel also observed that the marks entered North Star's facility. The gouges ended where the broken glass was found in the roadway at the accident scene. The gouges also "appeared . . . that they were very fresh." Sevigny's co-worker Dean Rioux saw the grooves in the westbound travel lane of the road. According to Rioux, the marks "almost looked like they started almost immediately as he left the North Star Gate." And the marks did not continue beyond where Williams' car had gone off the road.

Thus, plaintiff has provided evidence from which a jury could conclude that an object was wedged between Sevigny's trailer tires. The gouge marks were made on the path Sevigny traveled, from North Star's facility to the location of the accident. The gouge marks were "fresh," and evenly spaced a distance roughly equal to the circumference of a trailer tire. Moreover, despite the fact that no slag was found, and that the object initially believed to be the object that struck Williams turned out to be concrete, there is evidence that suggests the object that struck Williams was, in fact, slag.

Viewing this evidence in a light most favorable to plaintiff, we conclude that plaintiff has presented sufficient evidence to indicate a "reasonable likelihood of probability" that defendants' actions served as the proximate cause of Williams' death. *Skinner, supra* at 166. Plaintiff's theory of the case is more than mere conjecture or speculation as those terms are used in *Skinner* as there is evidence to support this theory. Moreover, plaintiff's theory does not appear to be "just as possible as another theory" because there is no other theory which accounts for an object of metal composition to be thrown with the velocity necessary to travel through Williams' car as it did. We note that *Skinner* also cautions against requiring "absolute certainty," *id.*, and conclude that plaintiff has satisfied the evidentiary threshold.

Plaintiff next argues that the trial court erred in concluding that Sevigny and Phillips owed no duty to Williams, as the harm allegedly suffered was not foreseeable. Questions regarding duty are for the court to decide as a matter of law, *Harts v Farmers Ins Exchange,* 461 Mich 1, 6; 597 NW2d 47 (1999), and are subject to de novo review, *Benejam v Detroit Tigers,*

Inc, 246 Mich App 645, 648; 635 NW2d 219 (2001). If there is no duty, summary disposition is proper. *Howe v Detroit Free Press, Inc,* 219 Mich App 150, 156; 555 NW2d 738 (1996). However, if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the factfinder. *Id.*

"Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Id.* at 155. A duty of care may be specific, owing to the plaintiff by the defendant, or general, owing by the defendant to the public. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 15; 596 NW2d 620 (1999). The analysis to determine whether a duty exists as a matter of law requires

> a determination whether the relationship of the parties is the sort that a legal obligation should be imposed on one for the benefit of another. In determining whether a duty exists, courts examine different variables, including
>
> > "foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." [*Graves v Warner Bros*, 253 Mich App 486, 492-493; 656 NW2d 195 (2002) (internal citations omitted), citing *Krass v Tri-County Security Inc,* 233 Mich App 661, 668-669; 593 NW2d 578 (1999).]

Here, the facts developed during discovery were directed primarily at the issue of foreseeability.

In discussing the hazards associated with the roadways at North Star, plaintiff relies on the testimony of several people who were familiar with them. Sevigny found that the roadways there were "not good" as "there's a lot of [slag] laying all over the place." Sevigny agreed with plaintiff's counsel that if he picked up a piece of slag between his tires, it would cause a hazardous condition. Sevigny visually inspected the tires before he left; he looked at them from behind, and he checked to make sure there was nothing between them. Sevigny also kicked the tires to see if they were flat. Sevigny knew that other drivers use a rod to check if their tires were flat; however, Sevigny knew of no other way, other than a visual inspection, to insure that there was no object between his tires. After Sevigny initially loaded the truck, he noticed a piece of slag between the wheels of his fourth axle, which he removed. Sevigny rechecked his tires after he offloaded some slag. However, he did not check his tires after he reweighed his rig. Therefore, Sevigny drove his truck through the facility from the slag pile to the weigh station, and onto Front Street without checking his tires for any slag that might have been picked up between these two points.

Other witnesses offered different opinions. Dave Sterns, a crane operator with IMS, observed Sevigny pull a piece of slag from the truck tires while at North Star before the accident. Sterns told the police that it was common for drivers to pick up pieces of slag while driving on the facility grounds. But this observation was contradicted by Richard Hahey, a superintendent at IMS, who stated it was uncommon. Sterns added that most drivers were conscientious about checking their axles before leaving.

James Jonasen testified that he never saw pieces of debris on the roadways at North Star. However, Jonasen acknowledged that a large piece of slag on the roadway could be dangerous. He stated that "a piece of material the right size could be lodged in-between tires anywhere, yes, at any time and come out at any time." On the other hand, Rioux testified that "there's lots of debris" at the facility. Ronald Cutter testified that he was aware that removal of slag was an issue. Cutter acknowledged that the facility's roads were typical of a foundry's roads, in that there was "scrap laying alongside the track and stone on the road and things." Although Cutter never damaged his vehicle there, he noted that IMS "always had a sweeper running through there." However, Cutter also admitted that "for the most part it was fairly clean." David Suttles corroborated Cutter's testimony that the roads were clean. Suttles testified that the roads were in "fairly good shape" when he drove them. During his deposition, Suttles agreed with plaintiff's counsel that a piece of slag six inches in diameter would pose a safety concern. However, Suttles was unaware that anyone ever found such a piece of slag lying on the roadway.

Moreover, there was testimony about how a driver should guard against the possibility of picking up an object between his or her tires. Rioux stated that he checks his tires every time he loads or unloads the vehicle because the debris could cause a flat tire or a hazardous condition if caught between the tires; Rioux believed that checking tires is "common sense." Hahey also indicated that the drivers in the facility check their tires. Hahey noted that a "good operator" checks his vehicle every time he stops, to guard against "failures, oil leaks, stuff like that." Such a search also includes looking at tires, and checking between dual tires.

Looking at these facts, the issue of the foreseeability depends on the conditions of the road. We find that plaintiff has created a genuine issue of fact as to the condition of the roadway. Some of the witnesses testified that the conditions at the plant were dangerous, as slag and debris were frequently on the roadway, creating a factual dispute as to whether it was foreseeable that slag or other debris could become wedged between the truck drivers' tires. Moreover, the fact that IMS was concerned enough to sweep the premises for such slag suggests that errant pieces of slag posed a safety hazard. In addition, the fact that Sevigny removed a piece of slag from his tires shortly before the accident suggests that it was foreseeable that another piece of slag could become lodged in the tires.

We decline to determine the parameters of Sevigny's duty as a matter of law because factual questions exist regarding what characteristics giving rise to a duty are present. We point out that several witnesses testified that the North Star facility was kept in a clean manner, and that Sevigny inspected his tires before he initially weighed the truck. However, there is also no dispute that Sevigny did not check his tires after he drove through North Star's facility before he left. Because there is a question as to the conditions of the road, and whether Sevigny satisfied any duty by inspecting his tires, we conclude that the issue of Sevigny's duty, and therefore Phillips' duty, is properly an issue for the jury to resolve. *Howe, supra* at 156.

Finally, defendant agues that the trial court erred in excluding the testimony of three of plaintiff's expert witnesses: Thomas Bereza, Howard J. Bosscher and Jonathan Crane. The trial court ruled that these witnesses' testimony "lack[ed] the requisite evidentiary basis for want of specialization, scientific knowledge removing the testimony from the ambit of speculation." Testimony is admissible under MRE 702 if (1) the witness is qualified as an expert in a pertinent field; (2) the witness' testimony is relevant, or "will assist the trier of fact to understand the evidence or to determine a fact in issue"; and (3) the testimony is derived from "recognized

scientific, technical, or other specialized knowledge." *People v Beckley,* 434 Mich 691, 711; 456 NW2d 391 (1990).

We review for an abuse of discretion a trial court decision as to whether a particular witness qualifies as an expert. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). Here, plaintiff fails to offer evidence establishing that these witnesses are qualified to offer expert opinions. The portion of the deposition transcripts submitted by plaintiff fail to set out these witnesses' qualifications. Although Bosscher was a former director of safety at a trucking company, there was nothing else to suggest what his educational or experiential background involved. Moreover, there was nothing to suggest what Bereza's and Crane's qualifications were. Plaintiff's brief merely includes a conclusory statement that "plaintiff's experts were clearly qualified to testify and were versed in a recognized discipline."

As to the second requirement, that these witnesses' testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue," plaintiff similarly fails to show how that is the case. No evidence was presented to establish that this testimony would provide "recognized scientific, technical or other specialized knowledge," as is required under MRE 702. Rather, plaintiff's response is that these witnesses based their proffered testimony on common sense. For this reason alone, these witnesses should not be allowed to testify as experts.

> [A]s a prerequisite to the admission of expert testimony, "there must be knowledge [by the expert] in a particular area that "belongs more to an expert than to the common man," i.e., if the jury is in as good a position as the expert to determine intelligibly the issue involved without enlightenment from those with a specialized understanding of the subject, then the expert should not be permitted to express his opinion. [*Franzel v Kerr Mfg Co,* 234 Mich App 600, 621; 600 NW2d 66 (1999), quoting *Cirner v Tru-Valu Credit Union,* 171 Mich App 163, 168-169; 429 NW2d 820 (1988).]

In this case, the "common sense" testimony offered by these witnesses is just as much in the purview of the jurors as with these experts. Therefore, we conclude that the trial court did not abuse its discretion in excluding these expert witnesses' testimony.

Accordingly, we reverse the trial court's grant of summary disposition in favor of defendants, and affirm the trial court's evidentiary ruling regarding the challenged expert witness testimony.

/s/ Michael R. Smolenski

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Monroe Circuit Court
LC No. 00-011135-NI

Before: Smolenski, P.J., and White and Kelly, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I join in the lead opinion except that I dissent from the conclusion that the testimony of Bereza and Bosscher was properly excluded. I conclude there was adequate foundation for their testimony, and that any deficiencies went to the weight to be given the testimony by the trier of

fact. Regarding Crane, I agree that plaintiff has not shown an adequate foundation for the testimony.

/s/ Helene N. White

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Before: Smolenski, P.J., and White and Kelly, JJ.

KELLY, J. *(Concurring in part and dissenting in part.)*

I respectfully dissent from the majority's conclusion that the trial erred in granting summary disposition in favor of defendants. I concur in all other respects.

I. Generally Applicable Law

We review de novo a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(10) to determine whether, when the evidence is considered in the light most favorable to the nonmoving party, there is a genuine issue of material fact. *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Haliw v City of Sterling Heights,* 464 Mich 297, 309-310; 627 NW2d 581 (2001).

II. Causation

"[P]roving proximate cause . . . entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as proximate cause." *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a showing that "but for" the defendant's actions, the alleged injury would not have occurred. *Id.* at 163. Proximate cause involves the foreseeability of consequences, and whether a defendant should be held legally responsible for them. *Id.* Cause in fact must be established before proximate cause is an issue. *Id.* In granting summary disposition in defendants' favor, the trial court ruled that plaintiff could not establish that defendants' actions were the "proximate cause" of decedent's injuries:

> In the case at bar, there lacks adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials: iron and paint. Plaintiffs' [sic] expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendants' premises or actions. Plaintiffs' [sic] allegations lack the requisite linkage. While Plaintiffs' [sic] theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury.

The trial court correctly determined that plaintiff failed to establish a link between the decedent's death and any action on the part of North Star Co. (North Star) or International Mill Service, Inc. (IMS). Because plaintiff failed to establish that either of these defendants' actions caused plaintiff's death, the trial court properly granted summary disposition to defendants.

Plaintiff offers only circumstantial evidence of causation. While a plaintiff may prove causation with circumstantial evidence, she must effectively demonstrate causation:

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co,* 347 Mich 417, 422; 79 NW2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:
>
> > "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what

> produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Skinner, supra* at 163-164.]

Applying these principles to this case, plaintiff did not satisfy her burden of presenting "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. Plaintiff argues that the link between defendants and the decedent's injury is the slag that was picked up by Sevigny's truck. But plaintiff has failed to create a genuine issue of fact as to whether the object that caused the decedent's death was slag. The object that caused the injury has not been recovered. Plaintiff's expert, Scott Stoeffler, merely opined "that more likely than not, the object that went through [the decedent's] vehicle was composed primarily of carbon or alloy steel and was not a rock, stone or piece of concrete." While this opinion may bolster plaintiff's assertion that the object was not the concrete found at the scene, it does not demonstrate that the object was slag. Stoeffler did not, and could not, opine that the material was slag; rather, his opinion merely established that the object was something of a metallic nature. Even if the evidence demonstrates that the object *may* have been slag, the evidence, to an equal or greater extent, establishes that the object may have been any number of other things such as corroded steel, a scrap steel of unknown origin, or any broken part of a truck or car.

In granting summary disposition, the trial court relied on *Moody v Chevron Chemical Co*, 201 Mich App 232; 505 NW2d 900 (1993), in which the decedent died of allergic reaction after sustaining a bee sting. The plaintiff alleged that the bee that stung the decedent came from a hive that had been sprayed with the defendant's pesticide. In affirming the trial court's grant of summary disposition, this Court held:

> [O]ur review of the record discloses that the trial court found that, as a matter of law, plaintiff could not prove proximate causation. That is, because the stinging bee was not recovered, plaintiff could not prove that the bee that stung his son came from the nest that was sprayed, that it came in contact with the pesticide, or that its behavior was caused by exposure to the pesticide. Therefore, the causal sequence of events posited by plaintiff, although conceivably true, was not based on any evidence and was instead wholly speculative. Summary disposition was proper under MCR. 2.116(C)(10) because plaintiff failed to create an issue of material fact regarding causation. [*Id.* at 238.]

Here, just as in *Moody*, plaintiff can only speculate that the object causing the decedent's injury came from North Star and IMS's operations. At most, the evidence establishes that an object of unknown origin was picked up on the apron of the driveway leading to Front Street where the fresh gouge marks started. There is no evidence demonstrating where, when, or how the unidentified object came to be there. It could have been dropped by Sevigny's co-worker Dean Rioux's truck which, also carrying a truckload of slag, immediately preceded Sevigny onto Front Street. It could also have come from myriad other sources. The evidence demonstrates

that Front Street is located in an industrial area heavily traveled by trucks and other industrial traffic.

The evidence is without selective application to plaintiff's theory or any one of North Star's alternative theories. It is insufficient to submit a causation theory that, "while factually supported, is, at best, just as possible as another theory." Plaintiff has not presented substantial evidence from which a jury could conclude more likely than not that but for defendants' conduct, the decedent's injuries would not have occurred. *Skinner, supra* at 164-165.

Therefore, I agree with the trial court that plaintiff failed to create a genuine issue of factual causation. Instead, plaintiff "posited a causation theory premised on mere conjecture and possibilities." *Id.* at 174.

III. Duty

Although I agree with the majority that plaintiff produced sufficient evidence to create a genuine issue of fact as to whether the object that caused decedent's death was propelled by the truck driven by defendant Marc Sevigny and owned by defendant J. R. Phillips Trucking Ltd. (Phillips), I believe that the trial court correctly determined as a matter of law Sevigny and Phillips owed no duty to the decedent to detect and remove that object.[1]

Generally, there is no duty obligating one person to aid or protect another unless there is a special relationship between them or some special circumstance, *Beaudrie v Henderson,* 465 Mich 124, 141; 631 NW2d 308 (2001) *and* the protected party is readily identifiable as foreseeably endangered. *Murdock v Higgins,* 208 Mich App 210, 214-215; 527 NW2d 1 (1994). In determining whether a duty exists, a court must consider the foreseeability of the harm, the relationship between the parties, the degree of certainty of injury, the closeness of the connection between the conduct and the injury, any moral blame attached to the conduct, any policy of preventing future harm, and the consequences of imposing a duty and the resulting liability for breach. *Krass v Tri-County Security, Inc,* 233 Mich App 661, 667-669; 593 NW2d 578 (1999). Whether a duty exists is a question of law for the court. But if the determination of duty depends on factual findings, the jury must make those findings. *Holland v Liedel,* 197 Mich App 60, 65;

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[1] Plaintiff additionally alleged that IMS had a contractual duty to keep its premises "clean and free" from debris, i.e. slag. But our Supreme Court recently held in *Fultz v Union-Commerce Associates,* 470 Mich 460, 460; 683 NW2d 587 (2004):

> [L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that counteract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based upon that contract will lie.

Plaintiff failed to show any such independent duty on the part of IMS.

494 NW2d 772 (1992). If there is no duty, summary disposition is proper. *Howe v Detroit Free Press, Inc,* 219 Mich App 150, 156; 555 NW2d 738 (1996).

As recognized by the majority, the "facts developed during discovery were directed primarily at the issue of foreseeability." Yet, the legal determination of duty does not rely on foreseeability alone, but implicates several other factors. Plaintiffs have not produced any evidence that would support the finding of a relationship between the decedent and defendants, special circumstances, the degree of certainty of injury, any connection between defendant's conduct and the decedent's injury, moral blame attached to defendants' conduct, or the burdens and consequences of imposing a duty under these circumstances. *Beaudrie, supra* at 124; *Krass, supra* at 667-669. As a matter of law, plaintiff points to no case or statute establishing a special relationship or circumstance. Plaintiff also cites no regulation or industry standard imposing a duty of inspection before entering onto a public roadway. On this record, no genuine issues of fact exist regarding "what characteristics giving rise to a duty are present." *Howe, supra* at 156. The trial court did not err in concluding, as a matter of law, that Sevigny and Philips owed no duty to the decedent.

Yet I would point out that even assuming an on-going duty to inspect tires and further assuming Sevigny's tires picked up an object after his last inspection, the evidence does not establish that Sevigny breached the alleged duty to inspect tires before leaving North Star premises. There is no evidence that Sevigny's truck picked up any object *before* leaving the North Star, the point at which plaintiff alleges that Sevigny had a duty to inspect. The gouge marks relied on by plaintiff indicate that an object was picked up, at the earliest, as the truck drove over the apron abutting Front Street, which would have been *after* the point in time plaintiff alleges Sevigny should have inspected the tire. Thus, the fact that the object was picked up by the truck, does not create a genuine issue of fact as to whether Sevigny inspected the tires before he left North Star as plaintiff alleged he should have.

IV. Expert Witnesses

I do agree with the majority that the trial court did not abuse its discretion in excluding plaintiff's expert witnesses. After review of the record, there is a total absence of any evidence establishing that these witnesses are qualified to offer expert opinions. As the majority notes, "Plaintiff's brief merely includes a conclusory statement that "plaintiff's experts were clearly qualified to testify and were versed in a recognized discipline" and "No evidence was presented to establish that this testimony would provide "recognized scientific, technical or other specialized knowledge," as is required under MRE 702." Because plaintiff fails to articulate and identify any supportive evidence of the experts' qualifications and basis for the expert opinions, I agree that on this record, the trial court properly excluded the proffered experts.

/s/ Kirsten Frank Kelly

STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION WHEN PLAINTIFF FAILED TO PRESENT ADMISSIBLE EVIDENCE WHICH REMOVED PLAINTIFF'S THEORY OF CAUSATION FROM THE REALM OF SPECULATION AND CONJECTURE?

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

The trial court says "yes."

The Michigan Court of Appeals says "no."

II.

WHETHER PLAINTIFF PRESENTED FACTS DEMONSTRATING THE EXISTENCE AND BREACH OF ANY DUTY OWNING BY INTERNATIONAL?

Plaintiff-Appellee says "yes."

Defendants-Appellants say "no."

The trial court says "no" with respect to the same claim of duty against the Co-Defendants.

The Michigan Court of Appeals says "yes."

STATEMENT REGARDING APPELLATE JURISDICTION

This Court has jurisdiction to consider and resolve this application pursuant to MCR 7.301(A)(2). This Court's jurisdiction has been timely and properly invoked, as evidence by the following:

- December 7, 2004 Court of Appeals Opinion, and;
- January 18, 2005 Application for Leave to Appeal.

STATEMENT OF FACTS

A. Introduction.

This is a wrongful death case in which Plaintiff asserts generally that the Defendants are responsible for an incident when an object of unknown origin and unknown identity crashed through the windshield of Sheri L. Williams, causing her death. Defendant-Appellee International Mill Service, Inc. ("International") originally sought leave to appeal from the September 5, 2002 Order [Denying International's Motion for Summary Disposition], entered by the Honorable William F. LaVoy of the Monroe County Circuit Court (see **Exhibit A**). Through that order and in conjunction with its March 5, 2002 Decision of the Court [on Defendants' Motion for Summary Disposition], **Exhibit B**, and its August 14, 2002 Decision of the Court [on International's Motion for Reconsideration], **Exhibit C**, the trial court originally determined that Plaintiff-Appellant Beverly Heikkila, Personal Representative of the Estate of Sheri L. Williams, deceased, presented sufficient admissible evidence to create a jury question on causation in this wrongful death case grounded in allegations of negligence. This Court denied leave to appeal.

Upon the close of discovery, the trial court reexamined whether Plaintiff could establish her burden of proof with respect to causation, and determined that all the Defendants were entitled to summary disposition (see **Exhibit D**, November 20, 2002 decision of the Court; **Exhibit E**, Judgment).

On December 7, 2004, the Michigan Court of Appeals issued its 2-1 Opinion, in which it reversed the trial court's grant of summary disposition in favor of the Defendants, and reinstated the case for purposes of trial. In the course of that Opinion, the majority (Smolenski, P.J. and White, J.) determined that Plaintiff presented sufficient testimony to establish: (1) the object was slag; and (2) the Defendants' actions served as a proximate cause of the decedent's death (**Exhibit S**, Slip Op, pp 3-4). The dissent (Kelly, J.), concluded that Plaintiff could only speculate that the object caused in the decedent's injury came from North Star and/or International's operations, and that the Plaintiff's evidence demonstrated, only to an equal or greater extent, that the object may have been slag (dissenting opinion, p 3). The dissent also found a lack of duty on behalf of International. (*Id.*)

Various Defendants have filed applications with this Court. International adopts by reference the factual statements filed by the respective Defendants, including the factual statements of North Star Steel and J.R. Phillips Trucking, Ltd. The following recitation is provided for emphasis and completeness.

According to Plaintiff's Complaint, on October 13, 1999, Plaintiff's decedent Sheri Williams was driving on Front Street in the City of Monroe when an object entered her windshield and struck and killed Ms. Williams (**Exhibit F**, Plaintiff's First Amended Complaint, ¶¶ 13-14). At the time of the incident, a truck had just passed Ms. Williams' vehicle traveling in the opposite direction (*Id*). The driver of

the truck was Mr. Sevigny, and the owner of the truck was Phillips Trucking, Ltd. (*Id*). The truck in question had picked up a load of slag on the premises of North Star Steel, with which International had contracted to process and dispose of slag produced by North Star Steel in its steel operations (*Id* at ¶¶ 16-17).

Plaintiff's theory of causation is that a projectile "believed to be a piece of slag" was discharged from the truck wheels and propelled through the windshield of the automobile, thus causing Ms. Williams' death (*Id* at ¶ 15).[1] Plaintiff contends that International had a duty and responsibility to keep its premises, rented from North Star Steel, clean and free from debris, including slag (Plaintiff's Response to International's Motion for Summary Disposition, p 4) and that a piece of slag from these premises had lodged in the wheels of the subject truck, which in turn ultimately entered Ms. Williams' windshield (*Id*).[2]

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[1] Paragraph 15 of the First Amended Complaint states:

> "As the vehicles were passing each other, a projectile, believed to be a piece of slag, was violently discharged from the truck wheels and propelled through the windshield of the automobile, operated by Sheri L. Williams, striking Ms. Williams in the head and face as it passed through her vehicle."

Exhibit F, ¶ 15.

[2] In the First Amended Complaint, Plaintiff also asserted that International had a duty to inspect the trucks to ensure that no slag or other foreign objects were lodged in the wheels of the truck during the loading process or otherwise (see **Exhibit F**, First Amended Complaint, Count III ¶¶ 46-48; Count IV). In response to Defendant's Motion for Summary Disposition, however, Plaintiff dropped this theory of liability

(Continued on next page.)

The object which struck Ms. Williams was never found – to which Plaintiff has agreed in writing.[3]

Attached as **Exhibit G** is the argument portion of Plaintiff's Response to International's Motion for Summary Disposition. In that response, Plaintiff contends that Plaintiff adequately identified the projectile in question and associated that projectile with International. In support, Plaintiff states:

- The object was composed primarily of steel (*Id* at p 6);
- The object was lodged between the wheels of the truck operated by Mr. Sevigny (*Id*);
- Gouges in the street correspond to the circumference of Mr. Sevigny's vehicle and such marks ended in the area immediately adjacent to the glass from Ms. Williams' front windshield (*Id* at 6-7).

Plaintiff further argued that there was an absence of evidence that Mr. Sevigny's truck merely kicked up a stone, and that there was testimony that Mr.

(Continued from previous page.)
(see e.g., Plaintiff's Response dated 10/3/01, p 4: "The plaintiff agrees that IMS [International] does not have a duty to inspect the of the truck that utilizes its facility. Rather, that is the duty and responsibility of the truck drivers, themselves.")

[3] See Plaintiff's Response to Driver's and Truck Owner's Motion for Summary Disposition, incorporated by reference in Plaintiff's Response to International's Motion for Summary Disposition, p 3; see also Plaintiff's Answer to Motion for Summary Disposition, ¶ 4, posing: "[n]o contest" to ¶ 3 of International's Motion for Summary Disposition: "That the object, according to the investigating officer, was never located. However, the officer did locate and mark as evidence possible projectiles."

Sevigny's truck was the only adjacent vehicle to the Williams' car at the time of the incident (*Id* at p 8).

On December 18, 2001, International brought its motion for summary disposition, in which it asserted that Plaintiff's claims against International were based on speculation and conjecture and that Plaintiff had failed to present admissible proofs establishing that International caused the death. After Plaintiff had filed her response, and supplemental briefs were filed, oral argument took place on January 17, 2002.[4] The trial court took the matter under advisement and issued a written opinion, dated March 5, 2002. In that opinion, the trial court denied the motion, but did *not* address whether Plaintiff had presented sufficient proofs on causation (as opposed to duty) to create a jury question:

> "Premised on the foregoing, Plaintiffs have pled an actionable cause for negligence. Duty attaches to the instant Defendants. Defendants had a reasonable obligation to ensure that debris from their operations did not injure the foreseeable Plaintiff. Within the context of this case, it would not be an unreasonable standard of care to provide that Defendants maintain clean driveways or inspect that were leaving trucks for possible debris. It would be foreseeable that a negligent inspection of a truck tire leaving a slag littered driveway could result in injury should be a forcibly dislodged piece of slag strike a fellow motorist. Moreover, the Plaintiff has provided sufficient proofs to create a question of fact to get to a jury."

Exhibit B, p 7. The trial court did not enter a conforming order at that time.

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[4] A copy of that transcript is attached as **Exhibit P**.

On or about March 12, 2002, International filed its Motion for Reconsideration, together with exhibits. That motion was premised primarily on the fact that the trial court had failed to indicate that it considered the various deposition transcripts presented with the Defendants' original motions to dismiss (¶ 5 of Motion for Reconsideration). That motion also emphasized that Plaintiff failed to present any proofs that "any object which may have been projected from Mr. Sevigny's had its origin on property controlled by or maintained by International Mill Service." (*Id* at ¶ 21). On or about April 5, 2002, Plaintiff filed her response. The trial court heard oral argument on April 17, 2002.[5] The trial court took the matter under advisement and issued its written opinion on reconsideration on April 14, 2002. In that opinion, the trial court found that the documentary evidence provided by International came primarily from its own employees, and thus created "credibility" issues:

> "The deposition transcripts Defendant IMS [International] offers are mainly of the other Defendants' employees. Defendant IMS additionally offers the contract outlining obligations between them [sic] and Defendant North Star Steel Company. While the foregoing evidence may be of significant probative value, it does not go so far as to show there exists no genuine issue in respect to any material fact. It would seem that the deposition of a co-defendant's employee with regard to the same controversy could present credibility issues. The same credibility questions could exist in contract arrangements between co-defendant.

[5] A copy of that transcript is attached as **Exhibit Q**.

> This Court is not implying any impropriety. However, the reality is an employee might be pressured or impartial and contracts between co-defendants could contain obligations ignored or waived. These possibilities present factual questions toward the truth of the matter asserted. Therefore, the source and nature of Defendant IMS' evidence presents facts for the jury to decide . . . ."

Exhibit C, Opinion on Reconsideration, pp 3-4.

As with the earlier opinion, the trial court did not enter an order contemporaneous with its opinion for reconsideration. Rather, on September 5, 2002, the trial court entered a combined order denying International's Motion for Summary Disposition and Motion for Reconsideration. On September 26, 2001, International filed its Application for Leave to Appeal and accompanying documents with this Court, which was subsequently denied by a panel of this Court.

In the meantime, Co-Defendants refiled their motions for summary disposition after the close of discovery and argued once again that Plaintiff could establish a *prima facie* case against the respective Defendants. The trial court agreed through an Opinion dated November 20, 2002 (**Exhibit D**, also found as Plaintiff's Exhibit X). Subsequently a Judgment was entered which applied to all Defendants, and dismissed each Defendant from the lawsuit (Judgment, 1/29/03, **Exhibit E**).

In its November 20, 2002 decision, the trial court found that Plaintiff could not establish that the Defendants' actions were a proximate cause of the Plaintiff's injury (**Exhibit D**, p 4). Quoting *Moody v Chevron Chemical Co*, 201 Mich App 232, 238;

505 NW2d 900 (1993), the trial court reasoned that a mere possibility of causation is insufficient: "The causal sequence of events posited by plaintiff, although conceivably true, was not based on any evidence and was instead wholly speculative." (**Exhibit D**, p 5). The trial court linked this governing law to the state of affairs in this case at the close of discovery, and determined that Plaintiff could not carry her burden of proof in this regard:

> "[I]t becomes incumbent upon the Plaintiff to present evidence based on some fact linking their [sic] harm to some action of the Defendant [sic].
>
> In the case at bar, there lacks adequate evidence for a reasonable trier of fact to conclude Defendants proximately caused Plaintiff's injury. The object has never been discovered. Test results report the object was comprised of ubiquitous materials: iron and paint. Plaintiffs' [sic] expert witnesses' testimony conclude and speculate with regard to their theories that proffer no basis in fact for the source of the object linked to Defendant's premises or actions. *Plaintiffs' [sic] allegations lack the requisite linkage.* While Plaintiffs' [sic] theory may be conceivably true, Michigan law does not permit a jury to speculate between a couple or more coequally supposable causes of injury."

Exhibit D, pp 5-6 (emphasis supplied).[6]

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[6] The trial court also found that Plaintiff could not establish a duty on behalf of J.R. Phillips to inspect the truck upon leaving the facility given the "unusual sequence of events," relying on *Palsgraf v Long Island RR Co*, 162 NE 99 (NY 1928) (**Exhibit D**, pp 6-8). As mentioned earlier, this duty to inspect allegation originally brought against International was dropped in response to International's motion for summary disposition. See footnote 2, *supra.* Accordingly, Plaintiff did not address her second argument on appeal in the Michigan Court of Appeals against International.

The Michigan Court of Appeals reversed in a split decision. The majority found that Plaintiff presented sufficient evidence for the jury to determine whether the object was slag, and whether the Defendants' actions were responsible for the slag. On the first point, the majority opined that there was sufficient evidence on a sequence of points so that the question of identity of the object could be submitted to the jury:

- Something struck the decedent's windshield, dashboard and steering wheel, and then her head (Slip Op, p 3);
- An eyewitness testified that the object was less than a foot in size and irregularly shaped (*Id.*);
- One of Defendants' experts testified that it was doubtful that the object merely fell off a truck, (*Id.*); therefore the object "probably was thrown from the truck, as opposed to falling off of the truck" (*Id.*);
- The "only legitimate explanation" appears that the object was hurled by Mr. Sevigny's tires toward the decedent's car (*Id.*);
- The investigating officer believed that the object which struck the decedent's car was large and in the roadway (notably no foundation is provided for this opinion) (*Id.* at 3-4);[7]
- Plaintiff's expert testified that it was more likely then not that the object was composed "primarily of carbon of alloy steel" and was not a "rock, stone or piece of concrete" (*Id.* at 4); and
- Gouge marks found on the pavement "suggests that the object was lodged" in the truck's tires at the time the truck left North Star's facility (*Id.*).

[7] The majority acknowledges that this same person, Officer Ansel, later determined that the object was composed of concrete, not slag.

Based on these points, the majority determined that Plaintiff presented sufficient evidence to indicate a "reasonable likelihood of probability" that the Defendants' actions served as the proximate cause of the decedent's death:

> "Plaintiff's theory of the case is more than mere conjecture or speculation as those terms are used in *Skinner [v Square D Co,* 445 Mich 153; 516 NW2d 475 (1994)] as there is evidence to support this theory. Moreover, plaintiff's theory does not appear to be 'just as possible as another theory' because there is no other theory which accounts for an object of metal composition to be thrown with the velocity necessary to travel through William's car as it did."

Id. at 4.

The dissenting judge concluded that Plaintiff failed to present adequate and non-speculative testimony on either the identity of the object and whether the object was connected with the operations of the Defendants. On the first point, the dissent noted that the object could have been numerous matters, and that Plaintiff had not established, to an equal or greater extent, that the object was slag in light of these other possibilities:

> "Plaintiff argues that the link between defendants and the decedent's injury is the slag that was picked up by Sevigny's truck. But plaintiff has failed to create a genuine issue of fact as to whether the object that caused the decedent's death was slag. The object that caused the injury has not been recovered. Plaintiff's expert, Scott Stoeffler, merely opined 'that more likely than not, the object that went through [the decedent's] vehicle was composed primarily of carbon or alloy steel and was not a rock, stone or piece of concrete.' While this opinion may bolster plaintiff's assertion that the object was not concrete found at the scene, it does not demonstrate that the object was slag. *Stoeffler did not, and could not, opine that the material was slag; rather, his opinion*

*merely established that the object was something of a metallic nature. Even if the evidence demonstrates that the object **may** have been slag, the evidence, to an equal or greater extent, establishes that the object may have been any number of other things such as corroded steel, a scrap steel of unknown origin, or any broken part of a truck or car.*"

Exhibit S, dissenting opinion, p 3 (bold italicized in original).

The dissent also determined that it was speculative, at best, on whether the object could be connected to the Defendants' operations:

> "[P]laintiff can only speculate the object causing the decedent's injury came from North Star and IMS's operations. At most, the evidence establishes that an object of unknown origin was picked up on the apron of a driveway leading to Front Street where the fresh gouge marks started. There is no evidence demonstrating where, when, or how the unidentified object came to be there. It could have been dropped by Sevigny's co-worker Dean Rioux's truck which, also carrying a truckload of slag, immediately proceeded Sevigny onto Front Street. It could have also come from a myriad of other sources. The evidence demonstrates that Front Street is located in an industrial area heavily traveled by trucks and other industrial traffic.
>
> The evidence is without selective application to plaintiff's theory or any one of North Star's alternative theories."

Id. at 3-4.

The dissent also concluded that Plaintiff had pled but failed to demonstrate an independent duty on the part of International to keep its premises "clean and free" from debris i.e. slag. *Id.* at fn 1.

The following Argument sections of this application contain further factual discussion relevant to the issue presented.

B. **List of exhibits.**

Exhibit	Description
A	September 5, 2002 Order [Denying International's Motion for Summary Disposition]
B	March 5, 2002 Decision of the Court [on Defendants' Motion for Summary Disposition]
C	August 14, 2002 Decision of the Court [on International's Motion for Reconsideration]
D	November 20, 2002 Opinion
E	January 29, 2003 Judgment
F	Complaint
G	Argument portion of Plaintiff's Response to International's Motion for Summary Disposition
H	Ansel deposition transcript, pp 41-44, 103, 104
I	James Heikkila deposition transcript, p 99
J	Affidavit of Scott Stoeffler
K	Cutter deposition transcript, pp 9, 31, 33
L	Maniaci deposition transcript, pp 12, 13
M	Colombe deposition transcript, pp 34-36
N	Roper deposition transcript, p 20
O	Sevigny deposition transcript, pp 29, 31, 36, 37, 39, 85, 87, and 97
P	January 17, 2002 transcript

Q April 17, 2002 transcript

R Contract between North Star and International

S December 7, 2004 Court of Appeals' Opinion.

THE NEED FOR FURTHER APPELATTE REVIEW

This case presents two issues involving legal principles of major significance to Michigan's jurisprudence, MCR 7.302(B)(3) and appellate review is requested from a clearly erroneous decision of the Court of Appeals which, if left intact, will conflict with decisions of this Court and decisions of the Court of Appeals. MCR 7.302(B)(5). In the first Argument, International explains how the majority in the Court of Appeals misunderstood and misapplied a long line of appellate cases which culminates in the rule of law that a plaintiff must establish a theory which is more soundly supported by the evidence than any theory proffered by the defense. *Kaminski v Grand Truck WR Co,* 347 Mich 417, 422; 79 NW2d 899 (1956); *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994); *Moody v Chevron Chemical Co*, 201 Mich App 232; 505 NW2d 900 (1993). Here, the Plaintiff's evidence is without selective application to two or more plausible explanations, and therefore does not rise to a jury submissible question on causation.

In the second Argument, the Michigan Court of Appeals inaccurately extended an alleged contractual obligation to a stranger to a contract – namely Plaintiff's decedent – to create a duty of care placed upon International, absent a showing of any *independent* obligation towards Plaintiff's decedent. This "contract-created" duty of

care approach was just rejected by this Court during its last term. *Fultz v Union-Commerce Associates,* 470 Mich 460; 683 NW2d 587 (2004).

Sufficient grounds exist to trigger this Court's appellate review under MCR 7.302(B).

ARGUMENT I

THE TRIAL COURT PROPERLY GRANTED INTERNATIONAL'S MOTION FOR SUMMARY DISPOSITION WHEN PLAINTIFF FAILED TO PRESENT ADMISSIBLE EVIDENCE WHICH REMOVED PLAINTIFF'S THEORY OF CAUSATION FROM THE REALM OF SPECULATION AND CONJECTURE.

A. Standard of review and supporting authority.

The appellate courts review *de novo* the grant or denial of a motion for summary disposition. *Brown v Genesee Cty Bd of Comm'rs*, 464 Mich 430; 628 NW2d 471 (2001); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

B. Introduction – summary.

Plaintiff failed to present sufficient facts to show that International's actions or inactions caused the Plaintiff's decedent's death. Plaintiff failed to show by admissible evidence that the object was slag, and failed to show that the object, if slag, was associated with the operations of International. The evidence relied on by Plaintiff does not constitute "substantial evidence" from which a reasonable jury could conclude that more likely than not, but for International's actions or inactions, Ms. Williams would not have been killed. Under *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 5 (1994), a causation theory must be based in established fact

and cannot be "just as possible as another theory" of causation. *Id* at 164-165. The mere possibility that International's asserted negligence may have been the cause, either theoretically or conjecturally, of the decedent's death is insufficient to establish the requisite causal link.

Plaintiff's theory of liability is premised upon two overlapping theories of conjecture, namely: (1) the subject projectile was "slag" from the Defendants' combined premises; and (2) the slag was that over which Defendant International had control (which is the *sine qua non* of the premises liability theory against International). Plaintiff failed to present proofs to remove these theories from conjecture to jury question. Moreover, Plaintiff bears the burden of going forward and persuasion with respect to causation in a negligence case. See generally *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977). Plaintiff's failure to come forth with some basis in established fact to support these theories is fatal to Plaintiff's case against International.

C. Governing law.

1. A causation theory must have some basis in established fact.

To establish a *prima facie* case of negligence, Plaintiff must prove:

(1) The existence of a legal duty which defendant owed to plaintiff;

(2) That defendants failed to exercise ordinary care in performing this duty;

(3) That plaintiff's injury was proximately caused by defendant's breach of the duty; and

(4) That plaintiff suffered injury and damages.

May v Parke, Davis & Co, 142 Mich App 404; 370 NW2d 371 (1985).

Proof of causation requires both cause-in-fact and proximate cause. *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause-in-fact requires that the harmful result would not have come about but for the negligent conduct. *Haliw, supra* at 310. Cause-in-fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences and not mere speculation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). An explanation which is consistent with the known facts, but not deducible from them, is impermissible conjecture. *Skinner, supra* at 164. See also *Karbl v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001).

The mere fact that an accident has occurred, with nothing more, is not evidence of negligence on the part of anyone. Prosser, *Law of Torts,* §39, p 211. In order to establish a negligence claim, a party must offer evidence as to a defendant's absence of care to establish that defendant breached a duty.

Proximate cause is that which, in a natural and continuous sequence, unbrokened by independent causes, produces the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). It involves a determination that the connection

between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, and depends in part on foreseeability. *Lamp v Reynolds*, 249 Mich App 591, 599-600; 645 NW2d 311 (2002).

Plaintiff has failed to offer sufficient evidence that IMS breached a duty which caused the incident. Under Michigan law, speculation or conjecture is insufficient to satisfy plaintiff's burden of establishing that a defendant caused plaintiff's injury. *Kaminski v Grand Trunk Western Railroad Co*, 347 Mich 417; 79 NW2d 899 (1956).

In *Kaminski*, a railroad employee sued his employer when he sustained injuries upon being hit by a metal cart. During trial, plaintiff argued that defendant's train hit a metal cart lying near the train tracks, and the cart then hit plaintiff. After trial, defendant moved for a directed verdict and claimed that plaintiff's claim of causation was based upon speculation and conjecture. Defendant argued that the cart rolled into plaintiff without being struck by anything or the cart rolled into the train and then bounced off and hit plaintiff. This Court visited the issue and stated as follows:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deductible from them as a reasonable inference. There may be two or more plausible explanations as to how the event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only."

Kaminski v Grand Trunk Western Railroad Co, 347 Mich at 419.

This Court revisited the speculation causation issue in *Parsonson v Construction Equipment Co*, 386 Mich 61; 191 NW2d 465 (1971). There, an injured employee brought an action against the manufacturer and seller of the machine that plaintiff was working on when he was injured. The plaintiff suffered burns while tending an asphalt machine. As he unscrewed a gas cap on a motor to check the fluid level, gasoline spewed out and ignited. Plaintiff's theory of causation was that ignition came from the fully operating heater blower, and defendant's theory is that ignition came from some other source, like a cigarette, a spark from the muffler or from the engine itself.

This Court upheld the jury verdict for defendants. With respect to plaintiff's causation theory, the Court stated that:

> "The theory remains without selective application of the heater-blower as a source of ignition over the more probable, and much nearer source, that is, the steadily running engine immediately below the opening from whence the gasoline that burned the injured plaintiff came."

The Michigan courts have continued to hold that speculation and conjecture are insufficient to create a genuine issue of material fact. *McCune v Meijer, Inc*, 156 Mich App 561; 402 NW2d 6 (1986). Accordingly, Defendant is entitled to summary disposition as a matter of law.

2. The Plaintiff's burden on a motion for summary disposition brought under MCR 2.116(C)(10).

In presenting a motion for summary disposition, the moving party (here International) has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994), quoted with approval in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party (here Plaintiff) to establish that a genuine issue of disputed fact exists. *Neubacher, supra*. Where the burden of proof at trial on a dispositive issue rests on the nonmoving party, the nonmoving party may not rely on mere allegations or denials and pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exist. *Quinto, supra*; *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto, supra*; *McCormic v Auto-Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Quinto, supra*; *Maiden, supra*, 461 Mich at 120. As stated by the Michigan Supreme Court in *Maiden, supra*:

"The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules."

Maiden, supra, 461 Mich at 121.

D. Argument.

International joins in the arguments of Co-Defendants North Star Steel and J.R. Phillips Trucking, Ltd., contained in their applications, and provides the following additional argument.

1. Plaintiff cannot identify the object.

Plaintiff admits that the object that hit Ms. Williams was never found, and cannot be specifically identified. After the accident, the investigating officer searched for, but did not find, the object. The investigating officer for the Monroe Police Department, Corporal Ansel, made clear that they did not find a piece of slag on the roadway or in the surrounding area:

"Q Okay. As you sit here today – my question was did you ever find a piece of slag. You told me yes.

Now as you sit here today, you know that's not slag, true?

A I don't believe that piece was slag. I found a lot of pieces of a lot of stuff.

Q Okay. Let's go back to my original question.

Did you ever find a piece of slag on that roadway or the surrounding area?

A No.

Q Did you ever have anyone – witness, rumor, or otherwise – advise you that anyone had removed any slag or any other object from the roadway or the surrounding area between the time the accident occurred and your arrival?

A No.

Q And your understanding is that at least two gentlemen were at the scene contemporaneously with this accident occurring; is that correct?

A That's correct.

Q And neither of those gentlemen insinuated or in any way advise you that anything had been removed from that accident scene, correct?

A That's correct.

Q Was any other object found out at that scene that the possibility was raised could have went through the windshield of Ms. Williams' car among you officers who were investigating?

A I don't believe there was."

Exhibit H, Ansel dep, pp 42-43.

Corporal Ansel repeated later in his deposition that no slag was found in the subject area:

"Q All right. But what about the time of the accident; didn't somebody try to look for –

A Yes.

Q -- the projectile then?

A Yes, we did.

Q And you found no slag out there?

A We – we did not find anything that we believe would have come from that particular vehicle [truck]. . . .

A We were looking for something with an abrasion on it, possibly. We were looking for something with possible flesh on it and we were unable to locate any piece."

Id at pp 103-104.

The other group that scoured the accident scene was a search party put together by the Williams family, which was unable to locate the object that hit Ms. Williams (see **Exhibit I**, James Heikkila dep, p 99).

Moreover, what the investigating officers did find were two pieces of concrete in the precise area one would expect to find the object that went through Ms. Williams' windshield (**Exhibit H**, Ansel dep, pp 41-44).

To rebut this testimony, Plaintiff presented the Affidavit of Scott Stoeffler, found as **Exhibit J**. In that affidavit, Mr. Stoeffler, who identified himself as a senior microscopist, indicated that he had inspected and tested the Williams' vehicle and concluded:

> "It is my opinion that more likely than not, the object that went through Ms. Williams' vehicle was composed primarily of carbon or alloy steel and was not a rock, stone, or piece of concrete."

Id.

This affidavit does not constitute the requisite "substantial testimony" to establish causation under *Skinner, supra*. While Mr. Stoeffler may be of the opinion that there was some time of metallic particle in the Plaintiff's vehicle, he cannot opine, and did not opine, where the metal particles may have come from. Under *Skinner, supra*, a causation theory must have some basis in established fact. A "basis in only slight evidence is not enough." At best, Mr. Stoeffler's affidavit rises to the level of the "slight evidence" found insufficient by this Court in *Skinner*. Restated, Mr. Stoeffler's affidavit does not present the requisite substantial evidence from which a jury could conclude that more likely than not the injury-producing instrumentality was a piece of slag.

Additional doubt is cast by Mr. Stoeffler's report and amended report. In Mr. Stoeffler's 2002 report, he opined that the object was composed primarily of "corroded steel," which he amended two months later to indicate that the object also had a "mineral material" composition. See May 31, 2001 letter of Stoeffler to attorney Arnie Matusz, p 5; October 17, 2002, letter of Stoeffler to attorney Arnie Matusz, p 10. These letters – authored after the September 18, 2001 affidavit – create the possibility that the subject object was *rusty* (i.e., corroded steel) which also had a "mineral material" component, in stark contrast to the "slag" which Plaintiff contends was the injury-causing instrumentality.

Additional circumstantial evidence also defeats Plaintiff's theory that the object in question was slag. Mr. Ron Cutter (independent trucker) testified that he was not aware of any scrap on the roadway (**Exhibit K**, Cutter dep, p 9). On the day in question, Mr. Cutter had sat on the roadway for 5-10 minutes before the incident, with his window open. He did not hear what sounded like a gravel hauler driving with an object lodged between its (Cutter dep, p 33). Mr. Cutter had had the opportunity to be on the North Star premises on many occasions, and had never complained to International or complained about International with regard to the cleanliness of the roadway within the North Star facility (*Id* at 31). He testified that there was always a sweeper running through the plant area (*Id* at p 9).

Mr. Maniaci (independent witness driving behind Ms. Williams' vehicle) testified that he had never seen any debris in the roadway upon which the trucks would drive (**Exhibit I**, Maniaci dep, p 12), nor had he seen any large debris on Front Street, the place of this incident (*Id* at p 13).

So, too, Mr. Larry Colombe (J.R. Phillips employee) testified that he did not see any debris on the roadway (**Exhibit M**, Colombe dep, pp 34-35). Moreover, Mr. Colombe testified that he had never found anything stuck between his when he was operating his tractor-trailer on the North Star property in or around the International section of that property (*Id* at p 36).

Finally, Mr. Mike Roper, the "works manager" for North Star, testified that he had never seen a chunk of debris, slag, or concrete four inches or bigger in size (i.e., large enough to cause this incident) on the roadways of North Star (**Exhibit N**, Roper dep, p 20).

Plaintiff failed to establish that the object in question was slag. The Court need go no farther. Any other result requires the factfinder to speculate on evidence which is so flimsy that the finding would necessarily be based on speculation and conjecture. Absent the ability to show that the object is slag, Plaintiff cannot establish liability against International.

2. Plaintiff cannot associate the alleged "slag" with Defendant International.

Assuming *arguendo* Plaintiff has created a jury submissible case that the subject object was slag, Plaintiff must still show that International was associated with the particular slag which supposedly caused this injury. Plaintiff failed to do so in two respects: (1) there is no substantial evidence that slag was caught between the truck (as so theorized by Plaintiff); and (2) there is no substantive evidence that slag, if caught between the truck , was gathered from the International portion of the premises.

On the first point, Mr. Sevigny, the truck driver, testified that he did check his before he left the premises to look for anything that was "not supposed to be there"

(**Exhibit O**, Sevigny dep, pp 29, 37 and 39). The inspection was visual and consisted of a look between each of the sets of , and viewing the back of the truck and looking forward between the (*Id*). Nothing was found.

Mr. Sevigny further testified that he had never experienced a cut tire at the facility (p 97), had no indication on the day in question that he picked up anything at the International portion of the premises (*Id* at p 36), that he never saw anything on the roadways at North Star (*Id* at p 85), and that he does not drop his fourth and eighth axles on the tractor-trailer until he is on the paved road outside of North Star (and thus could not "pick up" the item in this fashion) (*Id* at 87).

In response, Plaintiff contends that Mr. Sevigny's truck were cut in a fashion to show that an object had been there at some point – and Plaintiff presumes that object is slag on this occasion. However, Mr. Sevigny testified that when his truck was backed on to the scale (*before* it left the yard), he did view an object lodged in his left axle, removed that piece, and then pulled back on the scale to be reweighed without the object (Sevigny dep, p 31). This object – unrelated to this incident – may have caused the alleged cuts in the truck , rather than the alleged slag. Who is to say?

On the second point, even assuming that an object was propelled from Mr. Sevigny's , Plaintiff had not been able to show its origin on property controlled or maintained by International. Review **Exhibit G** to this Brief to determine whether Plaintiff presented any substantive proofs that the alleged slag had its origin on

property controlled by or maintained by International Mill Service. Moreover, as previously discussed in the prior subsection, no one testified in this case that there were pieces of slag (let alone slag of the requisite size to cause this incident) that were lying around on the roadways of the North Star property (dep of Mike Roper, p 20).

Plaintiff also surmises that gouge marks discovered by Monroe Police Lieutenant Danny Richards suggests that the object originated from the Defendants' premises, rather than from an area outside the alleged control of the respective Defendants. Plaintiff fails to present any testimony that there were gouge marks in the North Star property, as opposed to on the road in which the truck was traveling. In fact, Corporal Ansel was sure that there were no such marks on the North Star property (Ansel deposition, p 22).

Plaintiff points to the contract between North Star and International for an argument that International was responsible for all the premises, not just the International portion of those premises (**Exhibit R**, Contract (also attached as Exhibit D to Defendant's Motion for Reconsideration). In so arguing, Plaintiff hoped to convince the trial court that International was responsible for the entire premises, and therefore this hypothetical piece of slag coming from anywhere on the premises would have been the responsibility of International. The flaw in this argument is that the contract states at Section G, ¶ 7.C. that International is responsible only for its select area:

"IMS [International] will install or maintain all roadways *within the boundaries of the IMS Work Area*."

(Emphasis supplied.)

This is fatal to Plaintiff's case because Plaintiff failed to present any evidence that would allow the trier of fact to logically determine that this hypothetical piece of slag had its origin in International versus North Star Steel versus other premises. The jury would simply be guessing on the origin of the subject object, even assuming that Plaintiff could demonstrate that it was slag.[8]

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[8] In the Michigan Court of Appeals, Plaintiff relied upon *res ipsa loquitur* in an effort to overcome its lack of evidence against the Defendants. The intermediate appellate court did not resort to this legal doctrine when reversing. It is inapplicable, in any event. In order to establish this claim, a plaintiff must prove:

(1) The event is of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) It must be caused by the instrumentality *within the exclusive control of the defendant*;

(3) It must not have been due to any voluntary action or contribution on the part of plaintiff; and

(4) Evidence of the true explanation of the event *must be more readily accessible to the defendant than to the plaintiff.*

(Emphasis added.) Prosser, *Law of Torts,* §39, p 214, citing Prosser, *Law of Torts* (5th ed), §39, p 244.

It does not appear that the *res ipsa loquitur* is directed at North Star or International, but rather at J.R. Phillips and Marc Sevigny, Jr. In the event the argument is directed at this Defendant, it fails for lack of factual foundation for several reasons. First,

(Continued on next page.)

3. Alternative theories for the incident.

It is not incumbent upon International to demonstrate to the trial court, to the jury, or to this Court that there are other possible alternative theories for the injury. It is sufficient for purposes of summary disposition that Plaintiff failed to present substantive evidence that establishes the object as slag, and further connects this alleged slag with the operations of International. It assists analytically, however, to consider the other possible sources of this incident, including:

(1) Something on the road was thrown from the truck (i.e., concrete or a different object);

(2) Something on the road was thrown from another truck (passing vehicle);

(3) A piece of concrete – if it were the object – could not causally relate to the operations of International;

(4) The object had its origin in a time and place unrelated to International nor an origin;

(5) That the driver had picked up an object in the wheels at another location (the driver had visited Great Lakes Steel before this trip);

(Continued from previous page.)
there is absolutely no showing that the instrumentality was within the exclusive control of International, which had no control – let alone exclusive control – of the truck. Indeed, Plaintiff has yet to discover the "instrumentality" other than two pieces of concrete picked up by Officer Ansel at his investigation while still upon the scene. Moreover, the evidence of the true explanation of the event is *not* more readily accessible to International than it is to the Plaintiff.

(6) If metallic, the object could have been any number of things (corroded steel, or a scrap of steel of unknown origin, or any broke part of a truck or car);

(7) An object – even "slag" – from any number of other sources (from another truck, from a non North Star/International area).

E. The Michigan Court of Appeals Opinion.

The Michigan Court of Appeals majority incorrectly chose select portions of witnesses opinions, while ignoring others, when concluding Plaintiff's theory of causation rises about the level of conjecture and speculation. At pages 3-4 of the Slip Opinion, the majority places considerable weight in Corporal Ansel's belief that the decedent's vehicle was struck by slag. Yet Corporal Ansel testified that he never found a piece of slag on the roadway or in the surrounding area, and that it was "[j]ust my observation and investigation . . . that it was a piece of slag. I did not get anything tested, I did not send it to the lab." **Exhibit H,** Ansel dep Tr, p 101. Thus Corporal Ansel himself acknowledged the lack of any *objective* evidence supporting his mere *belief* that the object may have been slag.

Citing Plaintiff's expert's opinion, Scott Stoeffler, that "more likely than not, the object . . . was composed primarily of carbon or alloy steel and was not a rock, stone, or piece of concrete," (Slip Op, p 4), the majority ignored altogether that Mr.

Stoeffler could not and never did opine that the subject object was slag. See **Exhibit J,** Affidavit of Scott Stoeffler.

As indicated earlier in this Argument, the Court of Appeals majority provides no support for the following statement and conclusion:

> "Moreover, despite the fact that no slag was found, and that the object initially believed to be the object that struck Williams turned out to be concrete, there is evidence that suggests the object that struck Williams was, in fact, slag."

Slip Op, p 4.

In this one sentence the Michigan Court of Appeals majority analysis demonstrates its inconsistency and, more importantly, the lack of any selective application of Plaintiff's theory of causation versus other theories of causation. If the object was never found, and if the object turned out to be concrete, then how can the majority conclude that there was a "reasonable likelihood of probability" that the Defendants' actions served as the proximate cause of the decedent's death? This is required under *Skinner,* 445 Mich at 166.

When this Court compares the majority opinion to the dissenting opinion, it will see that the former is an attempt to explain away the speculative nature of Plaintiff's causation theory by citation to possibilities rather than probabilities of occurrence. *Kaminski* and its progeny do not allow a court to "fill in the gaps" of a speculative theory by citing level upon level of possibility in hopes that it raises to a

probability. By mathematical equation, this stacking of possibilities renders the result less probably then any single component of the sequence. Therefore, even if the Court of Appeals is correct that one component of the Plaintiff's causation theory may have selective application (for example, that the object may be slag), unacceptable levels of conjecture and speculation remain because that component of the analysis must be integrated into the next step (that the slag is connected with the Defendants' operations, which exists by possibility only, not probability.) Of course, Plaintiff did not establish either leg of the analysis with probability or selective application over other theories. The possibility of a possibility destroys any claim that there was a "reasonable likelihood of probability" that the Defendants' actions served as the proximate cause of the decedent's death.

F. Conclusion.

Plaintiff did not identify the subject object with the requisite degree of specificity to survive summary disposition. Plaintiff also failed to present substantive evidence from which the finder of fact could determine that, if slag, the object had its origin with International.

The courts have not hesitated to affirm summary dispositions where the "best proofs" submitted by the Plaintiff require the jury to speculate. In *Moody v Chevron Chemical Co*, 201 Mich App 232; 505 NW2d 900 (1993), plaintiff claimed that a

chemical company was liable for providing a less than lethal dose of an insecticide, which supposedly allowed a bee to escape an insecticide spraying site, which in turn stung and killed the plaintiff's decedent. As one would expect, the bee was unavailable after the time of the incident. The trial court granted summary disposition. The Michigan Court of Appeals affirmed in language which unmistakably echoes the situation before this Court:

> "[T]he trial court found that, as a matter of law, plaintiff could not prove proximate causation. That is, because the stinging bee was not recovered, plaintiff could not prove that the bee that stung his son came from the nest that was sprayed, that it came in contract with the pesticide, or that it's behavior was caused by exposure to the pesticide. Therefore, the *causal sequence of events posited by plaintiff, although conceivably true, was not based on any evidence and was instead wholly speculative.*"

Moody, supra, 201 Mich App at 238 (emphasis supplied).

The series of events outlined by Plaintiff is, indeed, conceivable. Yet, the standard is not conceivable, but rather whether there is substantive evidence presented – admissible evidence – that would allow the jury to logically and legally adopted the Plaintiff's theory, over and above other possible causes of the incident. Restated, Plaintiff's proffered scenario is indeed a possibility. However, so are countless others. Plaintiff failed to present such evidence after more than considerable discovery in this case. Under *Maiden* and *Quinto, supra*, Plaintiff failed to present this evidence on an element of the cause of action – proximate cause – of which the

Plaintiff has the burden of going forward and the burden of persuasion with the fact finder.

ARGUMENT II

PLAINTIFF FAILED TO PRESENT FACTS DEMONSTRATING THE EXISTENCE AND BREACH OF ANY DUTY OWING BY INTERNATIONAL.

A. Standard of review and supporting authority.

The Court is referred to the corresponding subsection in Argument I.

B. Introduction-summary.

Plaintiff asserts that International owed to the decedent a duty of care with respect to the condition of the North Star premises. Yet the obligation cited by Plaintiff arises, if at all, from Plaintiff's reading of the contract between North Star Steel Company and International Mill Service. Plaintiff failed to demonstrate that any contractual duty to keep the premises "free and clean from debris," if it exists, extends to the Plaintiff's decedent.

In the trial court, Plaintiff also stipulated that International had no duty to inspect the trucks to ensure that no slag or other foreign objects were lodged in the wheels of a truck during the loading process or otherwise. See footnotes 2 and 6 to this Appplication, supra.

Finally, to the extent that the law recognizes Plaintiff's attempt to extend the alleged contractual duty to the Plaintiff's decedent, and that Plaintiff has not stipulated to the finding of "no duty" in this regard, there is no demonstration

whatsoever of a breach of this duty. As noted in the dissenting opinion, there is no evidence that the subject truck picked up any object *before* leaving the North Star premises. In fact, the gouge marks relied upon by Plaintiff indicating the identity of the object started on the apron abutting Front Street, which would have been after the point in time Plaintiff alleges that International had a duty of care.

C. Argument.

Plaintiff's theories of liability against International are contained in Counts III and IV. Under the heading "NEGLIGENCE, GROSS NEGLIGENCE, INTENTIONAL, WILLFUL AND WANTENT MISCONDUCT OF DEFENDANT IMS," Plaintiff asserts that Defendant IMS was contractually obligated to process and remove scrap materials created by North Star Steel's steel operations, including slag (**Exhibit F,** First Amended Complaint, ¶ 44). Plaintiff asserts that International had a duty and obligation to "properly load any and all motor vehicles removing the slag from the premises in a reasonably safe, careful, and prudent manner so as to avoid spillage of the slag into improper areas of the truck and into the traveled roadways of North Star Steel Company." (*Id.* at § 45). Plaintiff further asserts that International had the "duty and obligation to properly load the vehicle so as to avoid unnecessarily overloading them and/or improperly loading said vehicle." Finally, Plaintiff contends that International had a duty and obligation to inspect the motor vehicles before

departure from the loading zone, to ensure foreign objects had not become embedded or caught between the wheels of the motor vehicle prior to its departure from North Star Steel Company (¶¶ 47-48; Count IV, collectively brought against all the Defendants).

As made clear by ¶ 44, Plaintiff contends that International's contractual obligations to North Star – as viewed by Plaintiff and not accepted as true for purposes of this appeal – create a duty of care towards the Plaintiff's decedent. This is flatly incorrect under recent case law issued by this Court, namely *Fultz v Union-Commerce Associates,* 470 Mich 460; 683 NW2d 587 (2004). In *Fultz*, this Court held that no tort action lies by reason of or arising from a contactual obligation:

> "[L]ower court should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a 'separate and distinct' mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based upon that contract will lie."

470 Mich at 467.

The entirety of Plaintiff's Count III against International is premised on International's alleged breach of contract, which in turn runs between International and North Star Steel. Plaintiff does not allege, nor does there exist, a contractual obligation to Plaintiff or the Plaintiff's decedent. Nor does Plaintiff assert a separate, independent tort theory of liability against International. Rather, by reason of its

alleged breach of contract vis-a-vis North Star, International sought to be held liable in tort under a duty of care to the decedent. Under *Fultz* no such duty exists.

On a second point, Plaintiff cannot proceed against International based on a duty of care to inspect the truck to ensure no debris is caught in those, including slag. As noted in footnotes 2 and 6 of this application, Plaintiff abandoned this theory as to International upon International's motion for summary disposition ("the plaintiff agrees that IMS [International] does not have a duty to inspect the tires of the truck that utilizes its facility. Rather, that is the duty and responsibility of the truck drivers, themselves." Plaintiff's Response dated 10/3/01, p 4).

Assuming *arguendo* that Plaintiff has pled a legally recognized duty, and it survived the summary disposition process reflected in footnotes 2 and 6 of this application, there has been no showing of any fact which could establish a breach of that duty. Plaintiff's theory of liability is that the slag is somehow attributable to North Star and International and that the duty alleged would have removed the slag from the North Star and International work areas, thus avoiding the accident. Yet Plaintiff acknowledges that a predicate piece of her circumstantial evidence, the gouge marks, start *after* the truck left the work areas of North Star and International. Therefore there can be no actionable duty in this regard, or said another way, no breach of this alleged duty. This point was well summarized by the dissenting opinion:

> "I would point out that even assuming an on-going duty to inspect tires and further assuming Sevigny's tires picked up an object after his last inspection, the evidence does not establish that Sevigny breached the alleged duty to inspect before leaving North Star premises. There is no evidence that Sevigny's truck picked up any object *before* leaving the North Star [work area], the point at which plaintiff alleges that Sevigny had a duty to inspect. The gouge marks relied on by plaintiff indicate that an objection was picked up, at the earliest, as the truck drove over the apron abutting Front Street, which would have been *after* the point in time plaintiff alleges Sevigny should have inspected the tire. Thus, the fact that the object was picked up by the truck, does not create a genuine issue of fact as to whether Sevigny inspected the tires before he left North Star as plaintiff alleged he should have.

Exhibit S, Slip Op dissent, p 5 (emphasis original).

A similar analysis applies to International. If, as Plaintiff asserts in the breach of duty analysis, slag was picked up by the truck in the International work area, then the gouges relied on by Plaintiff for the proximate cause leg of the case would have started earlier, not outside the premises.

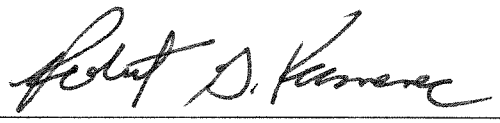
For all these reasons this Court should reverse or alternatively grant leave to appeal.

RELIEF

WHEREFORE, Defendant-Appellant International Mill Service, Inc., requests this Court grant leave to appeal and reinstate the trial court's grant of summary disposition, together with any other relief this Court deems appropriate, and award all costs and attorney fees sustained in pursuing this matter.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

ROBERT G. KAMENEC (P35283)
Attorney for Defendant-Appellant
International Mill Service, Inc.
38505 Woodward Ave, Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

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